IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 324

NORFOLK AND WESTERN RAILWAY COMPANY and WABASH RAILROAD COMPANY,
Appellants,

vs.

MISSOURI STATE TAX COMMISSION; Hunter Phillips; Howard J. Love; J. Ralph Hutchison, Members of the Missouri State Tax Commission, and J. R. Towson, Secretary of the Missouri State Tax Commission,
Appellees.

On Appeal from the Supreme Court of Missouri.

APPELLEES' PETITION FOR REHEARING.

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QUESTIONS PRESENTED FOR REVIEW.

In the Court's majority opinion a requirement inconsistent with the cases cited has now been placed upon the findings and assessment by a taxing authority.

In addition, appellants sought and gained the attention of the court by wig-wagging a red herring in the form of a prior unrelated tax assessment. The assessment to which we refer is the 1964 assessment levied against the Wabash Railroad Company before it became an integral part of the vastly larger Norfolk & Western Railway Company. In urging the

Court to measure the challenged assessment against the prior assessment, appellants advocated overruling the principal announced in **Pittsburgh, C.C. & St. L. Ry. v. Backus**, 154 U.S. 421 (1894), to the effect that an increase in assessment does not prove error in the increased assessment, 154 U.S. 432.

Appellees strongly argued in their Brief that the assessment contained an element of enhanced value. The Court in its opinion agreed that there might be enhanced value (O. 11)* but there was no evidence of the amount of such value. This is true; there is no evidence of record relating to amount. The burden is clearly on the taxpayer to present evidence and the record is barren of such evidence.

The questions presented are these:

1. In holding that the challenged assessment cannot be sustained by enhanced value, this Court has reversed the burden of proof long established by case law and overruled **Butler Bros. v. McColgan**, 315 U.S. 501 (1942), the cases cited therein and the cases subsequently relying thereon.

2. By not recognizing the presumption that the assessment is constitutionally valid, the Court has presented a conflict with the line of cases represented by **Green v. Frazier**, 253 U.S. 233 (1920), and **Walters v. City of St. Louis, Mo.** 347 U.S. 231 (1954).

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*Citations to the portions of the record that are reprinted in the Appendix are cited (A. 1, et seq.); references to appellants' Brief are designated (B. 1, et seq.); references to the Court's Opinion are cited (O. 1, et seq.).

ARGUMENT.

I.

In holding that the challenged assessment cannot be sustained by enhanced value, this court has reversed the burden of proof long established by case law and overruled Butler Bros. v. McColgan, 315 U.S. 501 (1942), the cases cited therein and the cases subsequently relying thereon.

Prior to the opinion in the subject case, the taxpayer clearly had the burden when challenging the constitutionality of a tax assessment. **Norfolk & Western Ry. v. North Carolina, ex rel. Maxwell**, 297 U.S. 682, 685 (1936). "One who attacks a formula of apportionment carries a distinct burden of showing by clear and cogent evidence that it results in extraterritorial values being taxed." **Butler Bros. v. McColgan**, 315 U.S. 501, 507 (1942).

In holding that the assessment was so grossly excessive as to be unconstitutional, the Court did so without being presented with any evidence of record, or otherwise, regarding enhanced value. The Court in its opinion discussed the holding below regarding enhanced value and said the Missouri Supreme Court had concluded that the lease transfer had increased the value of the assets of the two separate lines and then stated in part as follows:

> "* * * This may be true, but it does not follow that the Constitution permits us, without evidence as to the amount of enhancement that may be assumed, to bridge the chasm between the formula and the facts of record. The difference between the assessed value and the actual value as shown by the evidence to which we have referred is too great to be explained by the mere assertion, without more, that it is due to an assumed and non-particularized increase in intangible value. See Wallace v. Hines, 253 U.S. 66, 69 (1920)." (O. 11).

Under the doctrine of **Butler Bros. v. McColgan**, appellants have the burden and it is strict. But where is there a scintilla of evidence presented by appellants at any level of this proceeding either proving up what enhanced value should be or what it should not be? The answer, we feel, is clear—there is no evidence. The Court, of course, recognized the absence of evidence in its opinion, stating:

> "* * * The basic difficulty here is that the record is totally barren of any evidence relating to enhancement or to going-concern or intangible value, or to any other factor which might offset the devastating effect of the demonstrated discrepancy. * * *" (O. 10)

It should be further noted that the appellants were quite aware of the form and content of tax assessments as evidenced by their extensive use of a prior unrelated and irrelevant assessment. Appellees are referring to the unchallenged 1964 assessment levied upon Wabash Railroad Company which was used extensively by appellants as a red-herring against which they argued that the challenged assessment be measured. Since appellants had knowledge of the general form and substance of the Tax Commission findings, they could have, and should have, asked for a separate finding on enhanced value or at least presented evidence, a task that they singularly avoided. Not only did appellants fail to produce any evidence for or against enhanced value, but they studiously denied that **Section 151.060 (3)**, RSMo 1959, was designed to get at enhanced value (B. 30, et seq.).

That a later assessment is larger than a prior assessment is no proof of the invalidity of the later assessment. **Pittsburgh, C.C. & St. L. Ry. v. Backus.** 154 U.S. 421, 432 (1894). This is all the more true in the instant case since the later assessment involves a different and vastly larger railroad.

It can be fairly concluded that not only have the appellants failed to present "clear and cogent evidence" opposing enhanced value, they have failed to present any evidence at all.

The record is replete with evidence showing the size of Norfolk & Western Railway compared to the size of Wabash Railroad at the time of the 1964 assessment. It can hardly be debated that an increase in enhanced value had inherently occurred as a result of the lease transfer and subsequent sale. The court agreed that this could be true, and yet seems to presume that the assessment is unconstitutionally excessive. Such a presumption appears to be in direct discord with the presumption that such acts are constitutional, which is further discussed in Point II.

In the absence of any proof in opposition to the issue of enhanced value, appellants cannot meet the strict burden of "clear and convincing evidence".

II.

By not recognizing the presumption that the assessment is constitutionally valid, the court has presented a conflict with the line of cases represented by Green v. Frazier, 253 U.S. 233 (1920), and Walters v. City of St. Louis, Mo., 347 U.S. 231 (1954).

The Missouri State Tax Commission is entitled to the presumption that the assessment is valid and the presumption operates as to any part of the assessment including the enhanced value element.

> "When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurption of power will authorize judicial

interference. . .'' **Green v. Frazier**, 253 U.S. 233, 239 (1920); **Walters v. City of St. Louis, Mo.**, 347 U.S. 231, 237 (1959).

While the **Green** case involved the construction of a tax statute, as did the **Walters** case, the presumption rule quoted is applicable to the subject case. Yet, the Court's opinion seems to be in conflict with **Green v. Frazier** and **Walters v. City of St. Louis, Mo.**, because the Court did not recognize and sustain the Missouri Supreme Court's holding (A. 85, 86) in which the presumption was allowed.

Appellants' evidence all goes to the depreciated equalized allocation by the mileage formula of rolling stock to the exclusion of any evidence regarding enhanced value. This is clearly demonstrated by the fact that appellants even vigorously denied that enhanced value was applicable under the Missouri statute involved, (B. 30, et seq.), a position which this Court obviously did not approve (O. 11). If the presumption is indulged the only possible result is to sustain the holding of the court below. To vacate and remand this subject case in light of the permissible presumptions presents a clear conflict in the line of cases represented by **Green v. Frazier**, supra, and **Walters v. City of St. Louis, Mo.**, supra.

CONCLUSION.

The conflict occasioned by this opinion with the cases previously decided by the Court has unsettled the long-established law in a very sensitive area of taxation. This particular matter involving ad valorem taxing of railroad rolling stock is crucial to the State of Missouri, as well as practically every state of the Union. If the burden of the taxpayer has now been changed and the well-established presumptions are no longer applicable, then the Court's holding should be made abundantly clear.

If appellees have misconstrued the Court's opinion and the cases previously discussed have not been disturbed, then appellants must fail in their attack upon the challenged assessment.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH.

This Petition For Rehearing is presented in good faith and is not presented for delay.

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